IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Petitioner, v. HON. CLARK W. MUNGER, Judge of the Superior Court of the State of Arizona, in and for the County of Pima, Respondent, and DENISE NICOLE PESQUEIRA, Real Party in Interest.	)	2 CA-SA 2012-0033 DEPARTMENT B DECISION ORDER

SPECIAL ACTION PROCEEDING

Pima County Cause No. CR20101039001

JURISDICTION ACCEPTED; RELIEF GRANTED

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¶1 In this special action, the state challenges the respondent judge's discovery sanction precluding certain evidence from being introduced in the underlying criminal proceeding, including a recording in which real party in interest Denise Pesqueira made incriminating statements to an acquaintance, L. Because we find clear error by the trial court and the state has no remedy by appeal, we accept jurisdiction, *see* Ariz. R. P. Spec. Actions 1(a); *State v. Bejarano*, 219 Ariz. 518, ¶¶ 14-15, 200 P.3d 1015, 1019-20 (App. 2008), and for the reasons stated below, we grant relief.

¶2 Initially, we find no error in the respondent judge's finding that the state failed to properly disclose text messages a police officer had sent L. during his conversation with Pesqueira and therefore that the state was subject to sanctions pursuant to Rule 15.7, Ariz. R. Crim. P. At a minimum, the state's disclosure of the text messages several days after learning of their existence was not "seasonabl[e]," as required by Rule 15.6(a), Ariz. R. Crim. P. Nor did the state, upon learning of the existence of the text messages, "immediately notify both the court and the other parties of the circumstances and when the disclosure will be available," as required by Rule 15.6(b).

¶3 The respondent judge abused his discretion, however, in precluding admission of the recording and related evidence at trial. *See* Ariz. R. P. Spec. Actions 3(c) (special action relief appropriate when respondent judge abused discretion). Preclusion "is rarely an appropriate sanction" for discovery violations and should be imposed only when it will "have a minimal effect on the evidence and merits of the case." *State v. Towery*, 186 Ariz. 168, 186, 920 P.2d 290, 308 (1996). Preclusion should be used only when "'less stringent sanctions are not applicable to effect the ends of

justice.'" *State v. Armstrong*, 208 Ariz. 345, ¶ 41, 93 P.3d 1061, 1070 (2004), *quoting State v. Schrock*, 149 Ariz. 433, 436-37, 719 P.2d 1049, 1052-53 (1986). Other factors relevant to determining whether preclusion is appropriate include "'how vital the precluded witness is to the proponent's case, whether the opposing party will be surprised and prejudiced by the witness' testimony, whether the discovery violation was motivated by bad faith or willfulness, and any other relevant circumstances.'" *Id.*, *quoting Schrock*, 149 Ariz. at 436-37, 719 P.2d at 1052-53.

¶4 We find none of the above factors supports the respondent judge's decision. The state asserts and Pesquiera does not dispute that the precluded evidence is of vital importance to its case. And we find no evidence of bad faith or willful misconduct by the state, nor any indication that a lesser sanction would not have been sufficient to cure any resulting prejudice. Finally, Pesqueira has identified no continuing prejudice resulting from the state's untimely disclosure.

¶5 The respondent judge's order precluding evidence as a sanction pursuant to Rule 15.7 is vacated and the matter is remanded for further proceedings consistent with this decision order.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

Judges Kelly and Espinosa concurring.